82-2100

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

No.

ELIZABETH M. BEHREND and BROOKSIDE LIMITED PARTNERSHIP, upon behalf of themselves and all others similarly situated,

Petitioners,

vs.

GOVERNMENT NATIONAL MORTGAGE ASSOCIATION and SAMUEL R. PIERCE, Secretary, Department of Housing and Urban Development,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Counsel for
Petitioners

June 22, 1983

QUESTIONS PRESENTED

1. Whether the doctrine of sovereign immunity bars petitioner from seeking money damages and declaratory relief, under Sections 1702 and 1723(a) of the National Housing Act?

2. Whether petitioners possess a constitutional property interest under the Due Process Clause of the Fourteenth Amendment and thus have standing to bring this cause of action?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners, Elizabeth M. Behrend and Brookside Limited Partnership prays that a writ of certiorari issue to review the judgment - order of the United States Court of Appeals for the Third Circuit entered in this proceeding on February 28, 1983.

OPINION BELOW

The Judgment - Order of the Third Circuit Court of Appeals appears in the Appendix hereto.

JURISDICTION

The Judgment - Order of the Court of Appeals for the Third Circuit was entered on February 28, 1983. A timely petition for rehearing either by panel or en banc was denied on March 25, 1983, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 12:

Sec. 1702
The Secretary [of Housing and Urban Development] shall, in carrying out subchapters . . . of this chapter, be

authorized, in his official capacity to sue and be sued in any Court of competent jurisdiction, State or Federal.

Sec. 1723(a)
[GNMA] shall have power . . . in its corporate name, to sue and to be sued, and to complain and to defend, in any Court of competent jurisdiction, State or Federal.

STATEMENT OF THE CASE

This suit, seeking class action certification; seeks money damages and declaratory relief on behalf of Petitioners and the proposed class they seek to represent to halt a continuing practice of the Government National Mortgage Company (hereinafter "GNMA") and the Department of Housing and Urban Development (hereinafter "HUD") of offering for sale at auction certain HUD insured mortgages held by GNMA. The attempt to bring this practice to an end is made because the mortgages are offered for sale by GNMA at approximately a forty (40%) percent discount to only a few selected parties who are permitted by HUD and GNMA to participate as bidders.

Petitioner, Elizabeth M. Behrend, (hereinafter "Behrend") is a general

partner of a limited partnership known as Brookside Limited Partnership (hereinafter "Brookside"). Petitioner Brookside has developed a one hundred twenty (120) unit apartment complex in Beaver County, Pennsylvania, which is financed by a HUD insured mortgage pursuant to Section 221d(4) of the National Housing Act (12 U.S.C. Sec. 221d (4)). GNMA has issued a commitment to purchase the mortgage from the construction lender. Brookside as mortgagor has provided four hundred ninety-four thousand ($494,000.00) dollars (up-front) equity in the project. When GNMA acquired the mortgage, it paid the construction lender 97.5% of par value. Brookside has paid the construction lender the other 2 1/2% of the mortgage amount (i.e. 2 1/2% of $2,734,000.00) in cash.

GNMA is a HUD approved mortgagee. Brookside and its general partners

including Petitioner Behrend are HUD approved mortgagors. Insured project loans may, by regulation, be transferred only to a transferee approved by the FHA Commissioner. No regulation, act, statute, or promulgation has been asserted of record suggesting what basis is used by the Commissioner to determine which tranferees are approved and which are not approved. The government asserts that a transfer of a project loan by GNMA which is a HUD insured loan to other than an approved mortgagee is not a transfer to a transferee approved by the Commissioner within the meaning of 24 C.F.R. Sec. 207 B 261(d), but nowhere suggests why HUD approved mortgagees should be able to reap a windfall by purchasing at auction mortgages at sixty (60) percent of par, while other parties including Petitioners Behrend and Brookside, who already have

vast sums of money invested in their own projects, plus much time and effort devoted to their projects, should not be permitted to bid at the auctions. Moreover, the record is devoid on any explanation why HUD approved mortgagees are permitted to continue this practice to the exclusion of others purchasing for a non-HUD approved mortgagee a HUD insured mortgage, for which service the HUD approved mortgagee charges the non-HUD approved mortgagee a fee. In fact, Petitioners were offered this choice by a HUD approved mortgagee, that this mortgagee would buy the mortgage on Petitioner's apartment complex for a sizable broker's fee.

GNMA is charged by law with raising funds to have money available to finance new projects. These funds are generated several ways. The government admits that

while one method of funding is the borrowing by GNMA of money from the Treasury, there clearly are other methods utilized. Another method used by GNMA is to offer certain of its mortgages at auction. Paragraph 34 of the Amended Complaint states that at the December 4, 1980 auction GNMA offered two hundred forty-eight (248) mortgages with a total package amount of $573,002,167.00. Bids amounting to $403,387,271.00 were received, of which those amounting to $113, 941,626.00 were accepted. The average accepted price at this auction was sixty (60) cents on the dollar. GNMA has conducted other auctions since. The mortgage upon Petitioner's Brookside Apartments real estate has been offered at these. Also, GNMA's own annual report discloses various funds in the control of the President of GNMA:

GNMA ANNUAL REPORT (1977)

Statement of Changes in Financial Position
(In thousands)

Funds Provided:	1977
Income from operations	$ 282,600
Mortgage liquidations	2,397,200
Appropriations for participation certificate insufficiencies	7,600
Borrowings from the U.S. Treasury	842,800
Net changes in other assets and liabilities	(25,400)
Adjustment applicable to prior year	
TOTAL FUNDS PROVIDED	$3,504,800

The major issue raised in this appeal, that being whether the doctrine of sovereign immunity bars appellant's action for monetary damages and declaratory relief under 12 U.S.C. Sections 1702 and 1723(a) is in dispute between the various Circuit Courts of Appeal. The Second Circuit has held that sovereign immunity does not bar a claim against the Secretary of HUD under the above referred to sections while the Fifth and Ninth

Circuits have held that sovereign immunity bars such a claim. S.S. Silberblatt Inc. v. East Harlem Pilot Block, 608 F.2d 28 (2d Cir. 1979). Lomas & Nettleton v. Pierce, 636 F. 2d 971 (5th Cir. 1981); Marcus Garvey Square, Inc. v. Winston Burnett Const. 595 F.2d 1126 (9th Cir. 1979). Also, a number of district courts have held for Petitioner's position, e.g.: Johnson v. Secretary of/and U.S. Department of Housing, 544 F. Suupp. 925 (E.D. La. 1981). Capitol Indemnity Corporation v. Freedom House Development, 487 F. Supp. 839 (D. Mass. 1980).

The Third Circuit, in the present matter, never reached the issue of sovereign immunity. Instead, while seemingly at oral argument agreeing with Petitioners' position that sovereign immunity should not bar Petitioners' cause of action, sua sponte, the Court raised

the issue of whether Petitioners have standing to bring this action. The Court's concern centered upon whether Petitioners possess a constitutional property interest. The Court thus decided this case based upon the standing issue. It is to be noted that the Petitioners by not being permitted to purchase the mortgage on their own project have sustained a loss of approximately $1,100,000.00.

Thus, Petitioners petition will address both the standing issue and the sovereign immunity issue.

REASONS FOR GRANTING THE WRIT

I. THE DOCTRINE OF SOVEREIGN IMMUNITY DOES NOT BAR PETITIONERS FROM SEEKING MONEY DAMAGES AND DECLARATORY RELIEF UNDER SECTIONS 1702 AND 1723(a) OF THE NATIONAL HOUSING ACT.

The applicable sections of the United States Code concerning Petitioners' claim are as follows:

12 U.S.C. Section 1702

"The Secretary [of Housing and Urban Development] shall, in carrying out the provisions of this subchapter and subchapters . . . of this chapter, be authorized, in his official capacity to sue and be sued in any Court of competent jurisdiction, State or Federal."

12 U.S.C. Section 1723(a)

"[GNMA] shall have power . . . in its corporate name, to sue and to be sued, and to complain and to defend, in any Court of competent jurisdiction, State or Federal."

As stated in petitioners' Statement of the Case this issue is in dispute between the various Circuit Courts of Appeal. The Second Circuit has held that sovereign immunity does not bar a claim against the Secretary of HUD under the above referred to sections while the Fifth and Ninth Circuits have held that sovereign immunity bars such a claim. S. S. Silverblatt Inc. v. East Harlem Pilot Block, 608 F.2d 28 (2nd Cir. 1979); Lomos & Nettleton v. Pierce, 636 F.2d 971 (5th Cir. 1981); Marcus Garvey Square, Inc. v. Winston Burnett Const., 595 F.2d 1126 (9th Cir. 1979). Also, a number of district courts have held for petitioners' position. e.g.: Johnson v. Secretary of/and U.S. Department of Housing, 544 F. Supp. 925 (E.D. La. 1981); Capitol Indemnity Corporation v. Freedom House Development, 487 F. Supp.

839 (D. Mass. 1980). Moreover, no one can deny the importance of this issue. Petitioners by not being permitted to purchase the mortgage on their own project have sustained a loss of approximately $1,100,000.00. Further, other potential petitioners are losing hundreds of millions of dollars at each HUD-GNMA auction.

The leading Supreme Court case on this issue is F.H.A. v. Burr, 309 U.S. 242 (1940), wherein the Court held that the predecessor statute to 12 U.S.C. Section 1702 (and by analogy to 12 U.S.C. Section 1723(a)) is a limited waiver of sovereign immunity in the sense that recovery is restricted to funds in the possession and control of the agency. Specifically, the Court states as follows:

"This policy is in line with the current disfavor of the doctrine of governmental immunity from suit, as evidenced by the

increasing tendency of Congress to waive immunity where federal governmental corporations are concerned. Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 59 S. Ct. 516, 83 L. Ed. 784 (1939). Hence, when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to "sue and be sued", it cannot be lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to "sue and be sued" is to be limited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the "sue and be sued" clause in a narrow sense. In the absence of such showing, it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to "sue and be sued", that agency is no less amenable to judicial process than a private enterprise under like circumstances would be." F.H.A. v. Burr, 309 U.S. at 245.

As this case is a case of first impression, this Court has never ruled upon this quesiton. However, the Second Circuit, in S. S. Silberblatt Inc. v.

East Harlem Pilot Block, 668 F.2d 28 (2d Cir. 1979), held that:

"For a claim to be against the Secretary, and therefore within the scope of this 'sue and be sued' clause, as opposed to a suit against the United States, any judgment for plaintiff must be out of funds in the control of the Secretary as distinguished from general Treasury funds. Burr, supra, 309 U.S. at 250, 60 S. Ct. 488. This requirement is satisfied if the judgment could be paid out of funds appropriated under the National Housing Act and in the control or subject to the discretion of the Secretary. See 12 U.S. C. Section 1702; Burr, supra, 309 U.S. at 250, 60 S. Ct. 488; United States v. American National Bank, 443 F. Supp. 167, 170-71 (N.D. Ill. 1977). Since the availability of funds to satisfy any judgment for appellant meets these criteria, the present suit must be treated as one against the Secretary and thus satisfying the "sue and be sued" clause, even though it would not be paid out of funds originally and specifically earmarked for the Taino Towers project."

Other district courts have also found for petitioners' position. In Johnson v. Secretary of/and U.S.

Department of Housing, 544 F. Supp. 925, 935 (E.D. La. 1981), the Court stated:

"In Industrial Indem. Inc. v. Landrieu, supra, the court held that the "sue and be sued" language of Section 1702 constitutes a qualified waiver of sovereign immunity in suits against the Secretary that relate to his duties under the National Housing Act. 615 F.2d at 646-647. A suit is against the Secretary, as opposed to a suit against the United States that could not be brought, if the judgment sought can be paid out of a "separate fund in the control and possession of the Secretary . . . that is severed from Treasury funds and Treasury control."
Id.; Southern Sog v. Roland, supra, 644 F.2d at 379; Dugan v. Rank, 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed.2d 15 (1963); Land v. Dollar, 330 U.S. 731, 738, 67 S.Ct. 1009, 1012, 91 L.Ed. 1209 (1947); FHA v. Burr, 309 U.S. 242, 250, 60 S.Ct. 488, 492-93, 84 L.Ed 724 (1940); S. S. Silberblatt, Inc. v. East Harlem Pilot Block, 608 F.2d 28, 36 (2d Cir. 1979). In the instant case, a judgment against the secretary can be paid out of money in the Special Risk Insurance Fund, 12 U.S.C. Section 1715z-3 which is a separate fund in the control and possession of the Secretary. Trans-Bay Engineers and Builders Inc. v. Hills, supra, 179 U.S. App. D.C. 184, 551 F. 2d 370, 376; S.S. Silberblatt v. East Harlem Pilot Block, supra, 608 F.2d 28, 35 (2nd Cir.). See generally Industrial Indem. Inc. v. Landrieu,

supra, 615 F.2d at 646-647 (dictum). Contra, Marcus Garvey Square, Inc. v. Winston Burnett Construction Co., supra, 595 F.2d at 1130-31; DSI Corp. v. Secretary of HUD, supra, 594 F.2d at 179-80; Armor Elevator Co., Inc. v. Urban Corp., supra, 493 F.Supp. at 882-83.

Also, petitioner's position is supported by the case of Capitol Indemnity Corporation v. Freedom House Development, 487 F.Supp. 839 (D. Mass. 1980). The Court, in Capitol, in examining the issue now before this Court stated:

In its first argument, HUD suggests that the recent authority of Marcus Garvey Square, Inc. v. Winston Burnett Const., 595 F.2d 1126 (9th Cir. 1979), which upheld sovereign immunity as a bar to a similar action, should control. Marcus Garvey Square, supra, determined that where a claim could not be satisfied from an identifiable source of funds in the control of the Secretary, the Secretary's specific waiver of sovereign immunity in 12 U.S.C. Section 1702 was unavailing, and without a specific waiver, an action in effect against the United States treasury would not lie. HUD acknowledges, however, that Marcus Garvey Square states a minority view, and in any event, applies only to circumstances in which plaintiff

does not identify a discrete source of HUD funds from which a judgment could be satisfied. When a discrete "res" has been identified, actions like this have been successfully brought against the agency and have surmounted sovereign immunity obstacles on the very equitable lien theory which Marcus Garvey Square acknowledged. See e.g., Trans-Bay Engineers and Builders, Inc. v. Hills, 551 F.2d 370 (D.C. Cir. 1976); Spring Construction Co. v. Harris, 562 F.2d 933 (4th Cir. 1977); Bennett Construction Co. v. Allen Gardens, Inc., 433 F. Supp. 825 (W.D. Mo. 1977); F. W. Eversley & Co. v. East N. Y. Non-Profit HDFC, 409 F. Supp. 791 (S.D.N.Y. 1976); Travelers Indemnity Co. v. First National State Bank of N.J., 328 F. Supp. 208 (D.N.J. 1971); American Fidelity Fire Insurance Co. v. Construccionees Werl, Inc., 407 F. Supp. 164 (D.V.I. 1975). The absence of an identifiable res to satisfy respondent's claim in Marcus Garvey Square, supra, distinguished that case from the many cases cited above, and in those prior cases claims against the Secretary have been uniformly allowed.

In the instant case, Capitol suggests that there are three possible identifiable sources of funds in the control of the Secretary from which a judgment could be satisfied: undisbursed mortgage proceeds, the Special Risk Insurance Fund created by 12 U.S.C. Section 1715z-3(b), and the proceeds from the June 1979 foreclosure sale. While the availability of the Special Risk Insurance Fund proceeds for this claim would be, in large part, a question of law, see, Marcus Garvey Square, supra, at 1130, the question of the availability and

control of the other possible sources of funds is primarily a question of fact to be resolved at trial. Because there are significant questions of fact with respect to funds available, and because the unavailability of such funds would be material - indeed, perhaps critical - to HUD's defense, summary judgment at this point is inappropriate. (emphasis supplied).

In the present case as in Capitol, supra, petitioners have identified without the benefit of discovery two funds of GNMA and HUD which are in control of the Secretary of HUD and the President of GNMA. These are: (1) The funds realized from sale at the auctions in dispute in this litigation and (2) the fund derived from excess rents collected by HUD and used for settlement of the class action case Underwood v. Hills, 414 F.Supp. 526 (D.C.D.C.1976). Also, the respondents admit that there are sources of funds other than the Federal Treasury in that the Vice President of the Office of

Mortgage Finance for GNMA has submitted a declaration of record that "(GNMA) funds are obtained primarily by borrowing from the Secretary of Treasury... " Moreover, the Courts in Silberblatt, Johnson and Capitol recognized the existence of various funds in the control of the Secretary of HUD as distinguished from general Treasury funds. Furthermore, GNMA's own annual report demonstrates the existence of various funds in the control of the President of GNMA:

GOVERNMENT

NATIONAL

MORTGAGE

ASSOCIATION

Statement of Changes in Financial Position

(In thousands)

Funds Provided:	1977
Income from operations	$ 282,600
Mortgage liquidations	2,397,200
Appropriations for participation certificate insufficiencies	7,600
Borrowings from the U.S. Treasury	842,800
Net changes in other assets and liabilities	(25,000)
Adjustment applicable to prior year	
TOTAL	$3,504,800

GNMA Annual Report (1977).

The conflicts between the Circuit Courts of Appeal on this issue, the importance of the issue, and the merits of petitioners' position justify the grant of certiorari to review the judgment below.

II. PETITIONERS POSSESS A CONSTITUTIONAL PROPERTY INTEREST UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND THUS HAVE STANDING TO BRING THIS CAUSE OF ACTION.

There are four essential elements which must be met before the Due Process Clause of the Fifth Amendment applies. In order, therefore, to be guaranteed the safeguards of the Due Process Clause, one must inquire initially whether those four essential elements are present. First, a person must have a recognized liberty or property interest at stake. Smith v. Organization of Foster Families, 431 U.S. 816, 837 (1977); Mathews v. Eldridge, 424 U.S. 319, 332 (1976). Second, even a temporary deprivation of that liberty or property will satisfy the required element of the Due Process Clause. North Ga.

Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 606 (1975); Fuentes v. Shevin, 407 U.S. 67, 86 (1972). Third, there must be some form of Federal action which deprives an individual of his liberty or property. Fourth, there must be some legitimate governmental or public reason asserted for depriving an individual of his liberty or property.

The Supreme Court, for many years, has recognized a property interest in the right to acquire property. In Buchanon v. Marley, 245 U.S. 60, 74 (1917), the Supreme Court in viewing what constitutes property under the Due Process Clauses of the Fifth and Fourteenth Amendments stated:

> "The federal Constitution and laws passed within its authority are by the express terms of that instrument made the supreme law of the land. The Fourteenth Amendment protects life, liberty and property from invasion by the states

without due process of law. Property is more than the mere thing which a person owns. It is elementary that it included the right to acquire, use and dispose of it. The Constitution protects these essential attributes of property." Holden v. Hardy, 169 U.S. 366.

Also, a number of States, such as Pennsylvania have specifically placed the right to acquire property into their Constitution.[1] In the present case, petitioners have been deprived of their

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1. Art. 1, Section 1, of the Pennsylvania Constitution states:

"All men are born equally free and independant, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."
Pa. Const., Art. 1, Section 1 (Emphasis added)

property right under the Fifth Amendment in that they are being excluded by GNMA-HUD regulations from bidding on the Brookside project of which they are the mortgagor. This exclusive action taken by the respondents does not rationally relate to any legitimate end of government. See Nowak, Constitutional Law, p. 410 (1978). In fact, by excluding a majority of the bidders at GNMA-HUD auctions, the respondents are violating their own enabling statutes under 12 U.S.C. 1716, a sub-chapter of the National Housing Act which states:

> "...The Congress declares that the purposes of this subchapter are to...manage and liquidate federally owned mortgage portfolios in an orderly manner with...minimum loss to the Federal Government..."

By only allowing a small number of people to bid at the auctions, the Government is losing 40% of the purchase price on their

mortgages. Furthermore, GNMA-HUD's overture to petitioners that they may now bid on their mortgage and others, but only by purchasing the properties through a GNMA-HUD approved mortgagee demonstrates that the regulation in question is a totally arbitrary deprivation of property, and thus violates petitioners' substantive due process rights to the extreme injury of petitioners.[2] [3] See Nowak, Constitional Law, p. 410 (1978).

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2. It is to be noted that petitioners if they would purchase the Brookside project through GNMA-HUD approved mortgagee would have to pay a lucrative broker's fee to the approved mortgagee.

3. Petitioners by not being allowed to purchase the mortgage on their own project have sustained a loss of approximately one million, one hundred thousand ($1,100,000.00) dollars.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment - order of the Third Circuit.

Respectfully submitted,

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15219

Counsel for
Petitioner

June 22, 1983

JUDGMENT ORDER

Elizabeth M. Behrend and Brookside Limited Partnership appeal from the dismissal of their suit against Government National Mortgage Association, contending that regulations of that corporation respecting eligibility for bidding at auctions of mortgages held by it violated due process and equal protection. We have examined the complaint and conclude that it fails to state a claim on which relief could be granted.

It is therefore O R D E R E D and A D J U D G E D that the judgment of the district court is affirmed. Costs are taxed in favor of appellees.

DATED: FEB 28, 1983

SUR PETITION FOR REHEARING

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

DATED: MAR 25, 1983

STATUTORY PROVISIONS

12 U.S.C. Section 1702

"The secretary (of Housing and Urban Development) shall, in carrying out the provisions of this subchapter and subchapters. . . of this chapter, be authorized, in his official capacity to sue and be sued in any Court of competent jurisdiction, State or Federal."

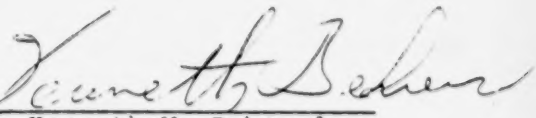
12 U.S.C. Section 1723 (a)

(GNMA) shall have power. . . in its corporate name, to sue and to be sued, and to complain and to defend, any Court of competent jurisdiction, State or Federal.

CERTIFICATE OF SERVICE

I certify that I have this 21st day of June, 1983 served three copies of the within Petition for Writ of Certiorari by first class mail, postage pre-paid upon Susan Engelman, Esquire, and upon Dwight Meier, Esquire, Department of Justice, P.O. Box 875, Benjamin Franklin Station, Washington, D.C. 20044 and that I have this 21st day of June, 1983 also served by first class mail, postage pre-paid, three copies of the foregoing Petition for Writ of Certiorari upon Craig McKay, Esquire, Room 633, U.S. Courthouse, 7th and Grant Streets, Pittsburgh, PA 15230. I have also made service upon the Solicitor General, Department of Justice, Washington, D.C. 20530, by serving three (3) copies of this foregoing Petition for Writ of Certiorari by first class mail,

postage pre-paid. I further certify that all parties required to be served have been served.

By 

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-2100

ELIZABETH M. BEHREND and BROOKSIDE LIMITED PARTNERSHIP, upon behalf of themselves and all others similarly situated,

Petitioners,

vs.

GOVERNMENT NATIONAL MORTGAGE ASSOCIATION and SAMUEL R. PIERCE, Secretary, Department of Housing and Urban Development,

Respondents.

SUPPLEMENTAL APPENDIX

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June 28, 1983

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ELIZABETH M. BEHREND and BROOKSIDE LIMITED PARTNERSHIP, upon behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
vs.	)	
GOVERNMENT NATIONAL MORTGAGE ASSOCIATION, and SAMUEL R. PIERCE, Secretary, Department of Housing and Urban Development,	)	Civil Action 81-059
Defendants.	)	

ORDER OF COURT

AND NOW, this 7th day of June, 1982,

IT IS ORDERED that the motion of defendants to dismiss the original and amended complaints of plaintiffs be and hereby is granted.

/S/ Donald E. Ziegler
Donald E. Ziegler
United States District
Judge

1(s)

cc: Mark Aronson, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ELIZABETH M. BEHREND and BROOKSIDE LIMITED PARTNERSHIP, upon behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
vs.	)	Civil Action 81-059
GOVERNMENT NATIONAL MORTGAGE ASSOCIATION, and SAMUEL R. PIERCE, Secretary, Department of Housing and Urban Development,	)	
Defendants.	)	

M E M O R A N D U M

Ziegler, District Judge

Presently before the court is the motion of defendants to dismiss the original and amended complaints of plaintiffs for failure to state a claim on which relief can be granted. The allegations of the complaints are vague but the theory of plaintiffs was made clear at oral argument on June 4, 1982. Plaintiffs' claim is

in the nature of a constitutional tort based on the precepts of the Fifth Amendment. Subject matter jurisdiction is extant pursuant to 28 U.S.C. § 1331 but the remaining allegations of plaintiffs as to jurisdiction are without merit. We hold that the claim is barred by the doctrine of sovereign immunity and therefore plaintiffs have failed to state a claim on which relief can be granted.

The United States, as sovereign, is immune from suit unless it expressly consents to be sued. United States v. Mitchell, 445 U.S. 535, 538 (1980). As Justice Harlan has stated: "However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune from suit." Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 410 (1970) (concurring opinion). It is true, of course, that immunity has been waived

by the Tucker Act, 28 U.S.C. § 1491, and the Federal Tort Claims Act, 28 U.S.C. § 2671. But the latter is clearly not applicable and the Tucker Act does not create a cause of action unless a substantive right otherwise exists. As the Supreme Court held in United States v. Testan, 424 U.S. 392, 401-402 (1976):

> Where the United States is the defendant and the plaintiff is not suing for money improperly exacted or retained, the basis of the federal claim - whether it be the Constitution, a statute, or a regulation - does not create a cause of action for damages unless, as the Court of Claims has stated, 'that basis. . . can be fairly interpreted as mandating compensation by the Federal Government for the damage sustained.'

Plaintiff have cited no substantive right or basis that mandates compensation by the sovereign. Rather they assert that Government National Mortgage Association is an independent agency with the general capacity to "sue and be sued" and not a subordinate unit of the United

States. See, United Electric Corp. v. United States, 647 F.2d 1082, 1084 (Ct.Cl. 1981) We hold that the instant action is in reality an action against the United States and therefore subject to the defense of sovereign immunity.

The issue of GNMA's alleged independence was litigated in Lomas & Nettleton Co. v. Pierce, 636 F.2d 971 (5th Cir. 1981). There the court held that all funding of the agency emanated from the Treasury of the United States under 12 U.S.C. §§ 1720(d) and 1721, and the "sue and be sued" clause 12 U.S.S. §1720 did not render the agency independent of the sovereign, since any judgment for the plaintiff must be satisfied from the Federal Treasury. The Court of Appeals agreed with the district court's conclusion of want of subject matter jurisdiction. We find the reasoning of that court to be persuasive and dispositive of plaintiffs' contention.

The allegations against the Secretary of HUD are also fatally deficient. There are no contentions that Mr. Pierce acted in any manner other than the nominal head of a governmental agency. There are no allegations that he acted extralegally. In short, plaintiffs' claim here again is in reality a suit against the United States.

As a final matter, we must determine whether we should transfer this action to the Court of Claims pursuant to 28 U.S.C. § 1406(c), despite our finding that plaintiffs' complaints must be dismissed for failure to state a claim. We think not. As urged by counsel for defendants, the Court of Claims has held that it lacks jurisdiction over non-existant claims for money damages based upon the Fifth or Fourteenth Amendments. Muehlen v. United States, 209 Ct.Cl. 690 (1976). Since this court has jurisdiction to adjudicate plaintiffs' claim under 28 U.S.C. § 1331, and we have found that claim is barred

by the doctrine of sovereign immunity, the Rule 12(b) motion of defendants will be granted.

DATED: June 7, 1982 /S/Donald E. Ziegler
Donald E. Ziegler
United States District Judge

cc: Mark Aronson, Esq.
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CERTIFICATE OF SERVICE

I certify that I have this 29th day of June, 1983, served three copies of the within Supplemental Appendix by first class mail, postage pre-paid, upon Susan Engelman, Esquire, and upon Dwight Meier, Esquire, Department of Justice, P.O. Box 875, Benjamin Franklin Station, Washington, D.C. 20044 and that I have this 29th day of June, 1983, also served by first class mail, postage pre-paid, three copies of the foregoing Supplemental Appendix upon Craig McKay, Esquire, Room 633, U.S. Courthouse, 7th and Grant Streets, Pittsburgh, PA 15230. I have also made service upon the Solicitor General, Department of Justice, Washington, D.C. 20530, by serving three (3) copies of this foregoing Supplemental Appendix by first class mail, postage pre-paid. I

certify that all parties required to be served have been served.

By _____

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Counsel for Petitioners

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No. 82-2100

In the Supreme Court of the United States

OCTOBER TERM, 1983

ELIZABETH M. BEHREND, ET AL., PETITIONERS

v.

GOVERNMENT NATIONAL MORTGAGE ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below correctly held that the "sue and be sued" clauses of 12 U.S.C. 1702 and 1723a do not permit petitioners to pursue a constitutional tort claim against respondents, where any judgments would have to be paid from the Treasury.

2. Whether petitioners possess a constitutionally protected property interest requiring due process before GNMA may offer "tandem program" mortgages for sale only to FHA-approved mortgagees.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. la) is reported at 707 F.2d 1399 (table). The opinion of the district court (Pet. Supp. App. ls-8s) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1983. A petition for rehearing was denied on March 25, 1983 (Pet. App. 2a). The petition for a writ of certiorari was filed on June 22, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

12 U.S.C. 1702 provides in pertinent part:

> The Secretary [of Housing and Urban Development] shall, in carrying out the provisions of [12 U.S.C. 1702 to 1723h, 1731a to 1748h-3 and 1749aa to 1749aaa-5]

be authorized, in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal.

12 U.S.C. 1723a(a) provides in pertinent part:

> [The Government National Mortgage Association] shall have power * * * in its corporate name, to sue and be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal, but no attachment, injunction, or other similar process, mesne or final, shall be issued against the property of the Association or against the Association with respect to its property * * *.

STATEMENT

1. The Government National Mortgage Association ("GNMA") provides special assistance for the financing of home mortgages.[1] This assistance is designed to make homes available for segments of the population that would otherwise be unable to obtain adequate housing. It also serves as a means of preventing declines in mortgage lending and home building activities. 12 U.S.C. 1716(b). In carrying out these tasks, GNMA is authorized to purchase and sell mortgages on residential housing. 12 U.S.C. 1717(b)(1). All the benefits and burdens incident to the administration of the functions and operations of GNMA inure solely to the Secretary of the Treasury. 12 U.S.C. 1722.

In performing these functions, GNMA is authorized to issue commitments to purchase and to purchase residential housing mortgages, including mortgages that are insured under the National Housing Act. 12 U.S.C. 1717(b)(1),

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[1]GNMA is a federal agency organized under the Department of Housing and Urban Development ("HUD"). 12 U.S.C. 1716(b), 1717(a)(2)(A).

1720(a). Under one group of mortgage purchase programs, the so-called "tandem" program, GNMA issues commitments to purchase from lenders mortgages reflecting loans at interest rates below the current market rate in order to subsidize the construction and maintenance of multi-family residential housing projects. The prices GNMA offers in its commitments to prospective mortgagees are more favorable than those that could be obtained from private investors. Thus, mortgage lenders are willing to originate below-market interest rate loans because GNMA's purchase commitments insure that the lenders will not be saddled with mortgages that return a smaller yield than could be obtained elsewhere.

After fulfilling its commitment to purchase the mortgages, GNMA attempts to sell them pursuant to its statutory authority. See 12 U.S.C. 1720(j). Generally the sales are conducted by auctioning groups of mortgages. All FHA-approved mortgagees are eligible to submit bids at such an auction. An FHA-approved mortgagee is one who has been found by the Secretary of HUD to be "responsible and able to service the mortgage properly." 12 U.S.C. 1709(b)(1). A mortgage not held by an approved mortgagee is not eligible for insurance under the FHA mortgage insurance program.

When GNMA sells the mortgages, it usually receives less than face value because of the below-market interest rates the loans bear. The difference between the favorable purchase price GNMA paid the lender and the lower price GNMA receives at auction reflects the amount of federal subsidy used to stimulate housing projects.

2. Petitioners are the developers and mortgagors of a 120-unit apartment project, financed under GNMA's tandem program. GNMA purchased the mortgage from the lender and was about to offer it for sale by auction, together with other tandem program mortgages. Since petitioners were not FHA-approved mortgagees, they were not eligible to submit bids at the auction.

Petitioners claim to have been injured by this restriction and filed suit against GNMA and the Secretary of HUD in the United States District Court for the Western District of Pennsylvania, seeking money damages, an injunction against the holding of the auction and declaratory relief. Although the allegations in their complaint were vague (see Pet. Supp. App. 3s), petitioners later explained to the district court (*id.* at 3s-4s) that their action was based on an alleged constitutional tort, similar to that claimed in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Respondents moved to dismiss the complaint on the ground that the claim was barred by sovereign immunity and that 12 U.S.C. 1702 and 1723a provided no basis for jurisdiction. These sections permit GNMA or the Secretary of HUD to be sued only if judgment against them could be satisfied out of a fund in their distinct and independent control. Since no such independent fund existed here, any sum awarded against GNMA or the Secretary to satisfy petitioners' claim would have to be met by the Treasury. Moreover, 12 U.S.C. 1723a provides that no injunction or other similar process shall be issued against the property of GNMA.

The district court agreed and dismissed the complaint (Pet. Supp. App. 1s-8s). The court found that petitioners' suit was in reality an action against the United States and as such was barred by the doctrine of sovereign immunity. The

court of appeals affirmed by judgment order, holding that the complaint failed to state a claim upon which relief could be granted (Pet. App. 1a).

ARGUMENT

The court of appeals correctly affirmed the judgment dismissing petitioners' complaint. The decision below does not conflict with the decisions of this Court or of any other court of appeals. Accordingly, no further review is warranted.

1. Petitioners first contend (Pet. 12-22) that their claim is not barred by the doctrine of sovereign immunity. They state, however, that the court of appeals "never reached" the sovereign immunity issue (*id.* at 10) — a concession that undermines their argument that the decision below conflicts with other decisions on this issue. In any event, petitioners' argument is wholly without merit.

In *FHA* v. *Burr*, 309 U.S. 242, 250 (1940), this Court noted that:

> only those funds which have been paid over to the Federal Housing Administration in accordance with § 1 and which are in its possession, severed from Treasury funds and Treasury control, are subject to execution. * * * To conclude otherwise would be to allow proceedings against the United States where it had not waived its immunity.

It is settled law that a "sue and be sued" provision does not constitute a waiver of sovereign immunity where the suit is in reality one against the United States; such provisions allow an action against a government agency only where the judgment could be met from a separate fund in the independent control of the agency. If the judgment would invade the public treasury, the action is barred by sovereign

immunity. See *Dugan* v. *Rank*, 372 U.S. 609, 620-621 (1963); *Land* v. *Dollar*, 330 U.S. 731 (1947); *FHA* v. *Burr*, *supra*, 309 U.S. at 250.

In the present case, GNMA and the Secretary possess no separate fund from which petitioners' constitutional tort claim could be met. All money in GNMA's possession is earmarked for implementation of its statutory duties and programs, none of which provides for damages or compensation for an allegedly tortious sale of mortgages. Monies allocated for the performance of GNMA's functions therefore cannot be diverted to the payment of petitioners' claim and any such sum would have to be obtained from the Treasury.[2]

Contrary to petitioners' contention (Pet. 13-20), the courts of appeals are not in conflict on the question whether the "sue and be sued" provisions of 12 U.S.C. 1702 and 1723a constitute a waiver of sovereign immunity. All the cited decisions are based on the same principle of law: immunity is mandated unless there is a separate independent fund that provides for the financial relief sought. The decisions differ only on the factual question whether the potential judgment in each particular case could or could not be satisfied from an independent fund, distinct and separate from the Treasury.

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[2]Any surplus money that might accrue to GNMA from the exercise of its statutory functions must be transferred to the Treasury. 12 U.S.C. 1722. Likewise, the Treasury would have to assume any burden imposed on GNMA by the courts that had not been provided for in its annual budget.

Nor could GNMA pay to petitioners moneys allegedly held in an "excess rental service fund" created under Section 236(g) of the National Housing Act, 12 U.S.C. 1715z-1(g). As the Senate Committee on Banking, Housing and Urban Affairs stated: "The reserve [fund] is required under Section 236(g) of the Act to be used for additional operating assistance payments under the terms specified in Section 236(f)(3)." S. Rep. No. 94-749, 94th Cong., 2d Sess. 10 (1976).

In *Lomas & Nettleton Co.* v. *Pierce*, 636 F.2d 971 (5th Cir. 1981), as in this case, an action for damages was filed against GNMA and the Secretary of HUD. Plaintiffs alleged a breach of an agreement to sell mortgages acquired by GNMA. The Fifth Circuit held that the "sue and be sued" provisions of 12 U.S.C. 1702 did not remove the sovereign immunity bar to suit.The court noted that "the crux of the matter is whether the judgment sought would have to be satisfied from the United States Treasury" (636 F.2d at 973; footnote omitted). In *Lomas*, there was no separate fund in the control and possession of the Secretary of HUD or GNMA from which an award of compensatory damages could be met. Accord, *Southern Sog, Inc.* v. *Roland*, 644 F.2d 376, 379 (5th Cir. 1981).

The Ninth Circuit reached a similar conclusion in *Marcus Garvey Square, Inc.* v. *Winston Burnett Construction Co.*, 595 F.2d 1126 (1979). In that case, the owner of a housing project sought damages from the general contractor, who then cross-claimed against the Secretary of HUD and other federal agencies connected with the housing project. The court of appeals employed the practical test whether any judgment would have to be satisfied from the Treasury. The court found that the claims against the federal officials were in reality a suit against the United States. As such they were barred by the doctrine of sovereign immunity. See also *Armor Elevator Co.* v. *Phoenix Urban Corp.*, 655 F.2d 19, 22 (1st Cir. 1981) (damages action for alleged breach of regulatory duties brought against the Secretary of HUD by a subcontractor on HUD-insured housing project is not within 12 U.S.C. 1702); *United States* v. *Adams*, 634 F.2d 1261, 1265 (10th Cir. 1980) (12 U.S.C. 1702 does not encompass a contract damages suit); *DSI Corp.* v. *Secretary of Housing & Urban Development*, 594 F.2d 177 (9th Cir. 1979) (finding no waiver of sovereign immunity under 12 U.S.C. 1702 and holding that district court lacked subject matter jurisdiction).

Petitioners rely (Pet. 15-16) on the Second Circuit's decision in *S.S. Silberblatt* v. *East Harlem Pilot Block*, 608 F.2d 28 (1979), to support the contention that the courts have disagreed over the interpretation of 12 U.S.C. 1702 and 1723a. In *Silberblatt*, a general contractor on a housing project sought payment from the Secretary of HUD for work performed. The court of appeals found that any judgment against the Secretary could be satisfied out of funds appropriated under the National Housing Act. Because those funds were in the independent control of the Secretary and subject to his discretion, the court concluded that the claim was not barred by the doctrine of sovereign immunity.

Thus, while *Silberblatt* turned on facts distinguishable from the present case, its holding was based on the same principle enunciated in the cases on which we rely: "[f]or a claim to be against the Secretary, and therefore within the scope of the 'sue and be sued' clause, as opposed to a suit against the United States, any judgment for plaintiff must be out of funds in the control of the Secretary as distinguished from general Treasury funds" (608 F.2d at 36).[3]

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[3]Nor were the two district court decisions relied upon by petitioners (Pet. 16-20) based on any different principle.

In *Johnson* v. *Secretary of/and U.S. Dep't of Housing & Urban Development*, 544 F. Supp. 925, 935 (E.D. La. 1981), the court found that an action against the Secretary of HUD could be brought, since any judgment in that particular suit could be met out of the Special Risk Insurance Fund, which was "a separate fund in the control and possession of the Secretary."

In *Capitol Indemnity Corp.* v. *Freedom House Development Corp.*, 487 F. Supp. 839 (D. Mass. 1980), the court found that sovereign immunity did not apply because the plaintiff could identify a distinct source of HUD funds in the control of the Secretary out of which a judgment could be satisfied. The court noted that questions of availability and independent control of such funds were primarily matters of fact.

2. Petitioners' second argument (Pet. 23-27), that their demand to participate in the mortgage auction is a constitutionally protected property interest, was not addressed by either of the lower courts. It is therefore not a proper subject for review by this Court. In any event, it is clear that petitioners do not possess a property interest that would be destroyed by GNMA's offer to sell tandem program mortgages only to FHA-approved mortgagees.

In *Board of Regents* v. *Roth*, 408 U.S. 564, 576-577 (1972), this Court held that

> The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. * * * To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Here, petitioners have no statutory right to bid for tandem program mortgages. This is not a case in which petitioners have in the past been allowed to participate in these mortgage auctions and have now been deprived of that benefit. Moreover, respondents have made no contract with petitioners to allow them to bid for the mortgages. Nor did GNMA hold out to them any implied promise that they would be allowed to bid. On the contrary, GNMA procedures makes it very clear that mortgages will be auctioned only to FHA-approved mortgagees. The sale of mortgages only to FHA-approved mortgagees is based on policy

considerations[4] and not unlawful discrimination of any sort. In these circumstances, petitioners have no legitimate property right or claim that has been taken from them without due process.

Nor do the cases upon which petitioners rely (Pet. 23-25) advance their cause. *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), was a case in which the plaintiff already was receiving statutory benefits and therefore had a property interest in not having those benefits terminated. *Smith* v. *Organization of Foster Families*, 431 U.S. 816 (1977), dealt with the removal of children from foster parents with whom close ties of family relationship had already been created. *Buchanan* v. *Warley*, 245 U.S. 60 (1917), was a case of clearly unlawful discrimination, in which a city ordinance prohibited whites from selling their houses to blacks and blacks from selling their houses to whites. It was in this context that the Court noted (*id.* at 74) that property includes "the right to acquire, use and dispose of it." This statement, however, does not support petitioners' claim to a constitutionally protected property interest in the tandem program mortgage sales.

3. There is an additional reason why this petition should be denied. The predicate for petitioners' claims is that they will be denied the opportunity to participate in GNMA's auction of their mortgage. According to HUD records,

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[4]Were GNMA to sell to a non-approved mortgagee, the FHA would have the right to terminate its insurance on the mortgage. Cancellation of FHA insurance would terminate the FHA regulatory agreement applicable to the property and enable the owners to change the nature of the housing. GNMA supports the FHA policy that requires property to remain subject to the FHA regulatory agreement throughout the term of the mortgage, thus ensuring that the property will remain available as moderate income housing. Moreover, GNMA could be deprived of its status as an FHA-approved mortgagee were it to transfer an FHA-insured mortgage to a party who was not so approved.

however, petitioners defaulted on the mortgage on September 30, 1982. On October 7, 1982, GNMA elected to assign the mortgage to the Secretary of HUD for the collection of insurance claim benefits. The mortgage was subsequently assigned to the Secretary of HUD and has been recommended for foreclosure.

While HUD also sells such mortgages at auction, the restrictions on GNMA auctions do not apply. Thus, should HUD offer for sale the mortgage at issue here, petitioners would not be barred from participation.[5] Their claim of preclusion from the GNMA auction is therefore moot.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1983

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[5]Office of Housing, U.S. Dep't of Housing & Urban Development, *Special Auction -- HUD Project Mortgage Auction July 27, 1983*, at 2. As mortgagors of the property, petitioners would be eligible to bid if the mortgage were brought current. HUD auctions only current mortgages.

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